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NOTES

THE DANGEROUS INSTRUMENTALITY DOCTRINE: UNIQUE AUTOMOBILE LAW IN FLORIDA

Among the social problems created by the "automobile age" is that of the uncompensated victim of negligent driving. In 1950 approximately 35,000 persons were killed on the highways of the United States, and in addition some 1,200,000 persons were injured.[1] The sole remedy that society through the law can offer those injured by the negligence of others is monetary compensation,[2] and this, though usually inadequate, is often of extreme importance to the victim or his family.

Several plans have developed in this country to assure that this remedy will not be rendered meaningless by the financial irresponsibility of the negligent driver or legally responsible owner.[3] Even when these laws are effective there remains the difficult problem created by the lending of automobiles, both gratuitously and for hire. Often the operator is financially irresponsible. As a consequence it is inevitable that situations arise in which the plaintiff asks the courts to extend common law concepts beyond their accepted limitations in order to hold the solvent owner of the automobile liable for the negligence of the financially irresponsible operator.

Courts throughout the country have responded by granting the requested relief, even when recovery could not be based on the strict application of the law of master and servant or principal and agent.[4] The theories under which this has been done are varied. For example, the so-called family-purpose doctrine of liability is now firmly established in a number of states.[5] This doctrine rests on the principle

[1]Figures issued by the National Office of Vital Statistics, THE WORLD ALMANAC 443 (1952).

[2]Penal sanctions for criminal negligence are small comfort to the injured party or his relatives.

[3]Financial responsibility and compulsory liability insurance laws; see Foreword, 3 LAW & CONTEMP. PROB. 465 (1936). Florida's financial responsibility laws are found in FLA. STAT. c. 324 (1951).

[4]Some courts hold the owner liable when he entrusts his car to a person who is intoxicated or has been drinking and is likely to become intoxicated, *e.g.*, Harrison v. Carroll, 139 F.2d 427 (4th Cir. 1943); McGowin v. Howard, 246 Ala. 553, 21 So.2d 683 (1945).

[5]Missell v. Hayes, 86 N.J.L. (1 Gunmere) 348 (1914); Dillingham v. Teeter,

that, although the common law rules as to liability of master and servant and principal and agent remain the same, the peculiar conditions surrounding the operation of automobiles demand a different application of these rules when the plaintiff is suing a negligent and financially irresponsible driver of an automobile belonging to his parent. Only Florida, however, has purported to apply judicially a dangerous instrumentality theory to automobiles. This doctrine has proved to be an effective device for imposing liability upon an automobile owner who would not otherwise be liable under common law concepts.[6]

ENUNCIATION OF THE DOCTRINE

The dangerous instrumentality doctrine originally developed as a concept for fastening liability upon the keeper of a dangerous instrument or agency without any necessity for a showing of negligent conduct on the part of the defendant.[7] Nor were defenses such as contributory negligence available to the defendant.[8] A modified version of the concept was carried into the field of agency in a manner which rendered a master liable for the misuse of a dangerous instrument entrusted to the servant, without reference to the principle

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91 Okla. 165, 216 Pac. 463 (1923); Jones v. Cook, 90 W. Va. 710, 111 S.E. 828 (1922). The attitude of many courts in extending the rules of agency in order to apply the family-purpose doctrine is exemplified in King v. Smythe, 140 Tenn. 217, 226, 204 S.W. 296, 298 (1918): "We think the practical administration of justice between the parties is more the duty of the court than the preservation of some esoteric theory concerning the law of principal and agent."

[6]Several states have enacted legislation having the same or a similar effect: CAL. VEH. CODE ANN. §402 (Deering 1948); D. C. CODE §40-403 (1940); IDAHO CODE ANN. §49-1004 (1948); IOWA CODE §321.493 (1946); MICH. STAT. ANN. §9.2101 (Rev. 1952). Typical of these statutes is N.Y. VEH. & TR. LAW §59, which reads in part: "Every owner of a motor vehicle or motor cycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motor cycle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner." Florida has a procedural statute which provides that a rebuttable presumption of liability is established by proof of the defendant's ownership of the vehicle and the identity of the driver, FLA. STAT. §51.12 (1951). See Legis., 1 U. OF FLA. L. REV. 286 (1948), for a detailed study of the statute.

[7]Fletcher v. Rylands, L.R. 1 Ex. 265 (1866), *aff'd,* L.R. 3 H.L. Cas. 330 (1868).

[8]Muller v. McKesson, 73 N.Y. 195, 29 Am. Rep. 123 (1878).

of *respondeat superior.*[9] This meant that the master would not have available as a defense the fact that the servant used the instrumentality outside the scope of his employment. Despite the origin of this doctrine, however, no cases have been found which dispense with negligence as an element of the action or which state that contributory negligence is not a defense.[10] Thus the inference is that negligence is an element of the plaintiff's case. It appears, therefore, that the extension of the dangerous instrument doctrine into the field of vicarious liability was of limited effect, and a reference to the result as the dangerous instrumentality doctrine is somewhat of a misnomer.

Historically the rule has been applied to agency relationships involving firearms,[11] boilers,[12] and explosives[13] and has been defined in the following broad terms:[14]

> ". . . whenever the master, having under his control some specially dangerous agency or instrumentality and which he is therefore under special obligation to keep with care, confides this duty to his servant or agent, he will be responsible if the duty be not performed, whether through the negligence or the wantonness or the malice of his servant or agent."

The cases, in fact, do not substantiate the sweeping character of this formulation, and the doctrine as applied to agency situations has fallen into disuse in most states.[15] Florida, however, extended the doctrine to automobiles in the case of *Southern Cotton Oil Co. v. Anderson,*[16] a decision which has developed into another species of

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[9]Pittsburgh, C. & St. L. Ry. v. Shields, 47 Ohio St. 387, 24 N.E. 658 (1890).

[10]See Horack, *The Dangerous Instrument Doctrine,* 26 YALE L.J. 224 (1917).

[11]Dixon v. Bell, 5 Moore & S. 198, 105 Eng. Rep. 1023 (1816).

[12]Huff v. Austin, 46 Ohio St. 386, 21 N.E. 864 (1889).

[13]French v. Center Creek Powder Mfg. Co., 173 Mo. App. 220, 158 S.W. 723 (1913).

[14]MECHEM, AGENCY 1512 (2d ed. 1914).

[15]MECHEM, OUTLINES OF AGENCY §471 (4th ed. 1952).

[16]80 Fla. 441, 86 So. 629 (1920). Defendant's cashier was authorized to use a company car to attend to company business in Pensacola, but on occasion he departed from his normal routine to deliver an acquaintance to her place of employment. The managing officers were aware of these digressions and had not objected to them. On the day of the accident the employee on arriving at the lady's house was requested to drive to a nearby residence for her raincoat. While on this errand the accident occurred.

"legal chameleon."[17] Actually the Court broached the doctrine when the cause was previously before it in *Anderson v. Southern Cotton Oil Co.*[18]

In this first opinion the Court strongly intimated that the defendant could be held liable solely because he authorized another to use an agency peculiarly dangerous in its operation, but the opinion concluded with some confusing and seemingly compromising language.[19] The cause was remanded for a new trial, whereupon the jury found for the plaintiff; and this verdict was affirmed in the second opinion. Fifteen pages of this decision were devoted to advocacy of the flat conclusion that the automobile was a proper subject for the application of the dangerous instrumentality doctrine. As in the opinion when the cause was first considered, however, the Court in the final paragraphs again employed language which made it questionable whether the decision was intended to limit the application of the modified[20] doctrine to the master-servant relationship or to extend it to any situation in which an owner entrusts his automobile to another. A determination of this question is of doubtful value now because interpretations of the decision by later cases are more likely to affect the future development of the doctrine in Florida.

Those states which have held the doctrine inapplicable to automobiles maintain that the automobile is not the type of machine or device to which the doctrine has been applied historically.[21] Huddy, a recognized authority on automobile law, states:[22]

"It is believed to be a common opinion among many that

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[17]For Florida's more awesome chameleon, see Crosby and Miller, *Our Legal Chameleon, The Florida Homestead Exemption:* I-V, 2 U. OF FLA. L. REV. 12, 219, 346 (1949).

[18]73 Fla. 432, 74 So. 975 (1917) (writ of error to a directed verdict for defendant).

[19]*Id.* at 442, 74 So. at 978.

[20]Since negligence is a prerequisite to liability in the Florida cases, it is assumed that the Florida Court, even in *Southern Cotton Oil Co. v. Anderson,* intended to adopt the dangerous instrumentality doctrine as modified in the field of agency and not the original doctrine of absolute liability. See p. ____ supra. All references to the dangerous instrumentality doctrine hereafter are to the modified doctrine.

[21]Greeley v. Cunningham, 116 Conn. 515, 165 Atl. 678 (1933); Priestly v. Skourup, 142 Kan. 127, 45 P.2d 852 (1935); Vicksburg Gas Co. v. Ferguson, 140 Miss. 543, 106 So. 258 (1925); Jones v. Hoge, 47 Wash. 663, 92 Pac. 433 (1907).

[22]1 HUDDY, CYCLOPEDIA OF AUTOMOBILE LAW §48 (9th ed. 1932).

the automobile constitutes a dangerous machine, and that the operation of the motor vehicle on the public thoroughfares is necessarily hazardous. This is a mistaken view. The motor carriage is not to be classed with railroads which owing to their peculiar and dangerous character, are subject to legislation imposing many obligations on them which do not attach to others."

The Florida Court in refuting this argument in the *Anderson*[23] decision quoted statistics showing that in 1918 there were in the United States 7,525 fatalities resulting from automobile accidents, while there were 8,610 fatalities from railroad mishaps, inferring that if railroads are dangerous instrumentalities automobiles must be also. In 1940 the Court in reviewing these figures noted the great increase in automobile accidents and stated that time had proved the wisdom of the *Anderson* case.[24] A comparison of the 1950 figures, previously stated, with the 1918 totals furnishes a distressing yardstick of the increasing hazard of motor vehicle operation. In 1951 in Florida alone there were 876 persons killed and 15,781 injured in automobile accidents.[25] If the automobile was a dangerous instrumentality in 1918, *a fortiori* it still is today.

SUBSEQUENT DEVELOPMENT: THE SWING AWAY AND THE SWING BACK

In cases before it in 1925[26] and 1926[27] the Court limited the application of the doctrine to cases involving a master-servant or principal-agent relationship. It held in these cases that the theory did not apply to automobiles for hire[28] and was not applicable when an employee had obtained consent to use his employer's vehicle for

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[23]This and further references to the *Anderson* decision refer to the second and principal opinion, Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920).

[24]Crenshaw Bros. Prod. Co. v. Harper, 142 Fla. 27, 58, 194 So. 353, 365 (1940).

[25]Summary of Motor Vehicle Traffic Accidents in Florida for 1951, Dep't of Public Safety, State of Fla. (1952).

[26]Eppinger & Russell Co. v. Trembly, 90 Fla. 145, 106 So. 879 (1925); White v. Holmes, 89 Fla. 251, 103 So. 623 (1925).

[27]Warner v. Goding, 91 Fla. 260, 107 So. 406 (1926).

[28]White v. Holmes, 89 Fla. 251, 103 So. 623 (1925).

limited business purposes but instead had diverted it to his own use.[29] In *Warner v. Goding* the Court stated:[30]

> "The majority opinion in [*Anderson*] has been interpreted by some as a departure from or modification of the doctrine of Respondeat Superior by this court, but it was not so intended."

Less than six years later the Court in *Herr v. Butler*[31] renewed its flirtation with the doctrine by holding an automobile owner liable for injuries inflicted through the negligent driving of his bailee. It stated that a bailor is liable even if he gratuitously entrusts his automobile to a stranger to be operated solely for the benefit of the latter. The Court ignored the cases subsequent to the *Anderson* opinion and based its decision on that case, quoting from it:[32]

> ". . . an automobile operated upon the public highways being a dangerous machine, its owner is responsible for the manner in which it is used, and his liability extends to its use by anyone with his knowledge or consent."

This decision represents the first instance in Florida of the employment of the dangerous instrumentality doctrine to hold a bailor liable for the negligent conduct of his bailee.

In the same year the Court in a later case,[33] undistinguishable factually from *Herr v. Butler,* followed the holding of the latter but further complicated the question of the basis of liability by stating that it was predicated upon the principle of *respondeat superior.* The opinion went on to say that the only effect of the prior holding was to recognize that the owner of an automobile always stands as a matter of law in the relation of "superior" to those whom he permits to use his license (registration and identifying tag) and operate his automobile. The Court thus again ignored the dangerous instrumentality doctrine, and this corrupted version of *respondeat superior* was the peg upon which it hung the liability.

[29]Warner v. Goding, 91 Fla. 260, 107 So. 406 (1926); Eppinger & Russell Co. v. Trembly, 90 Fla. 145, 106 So. 879 (1925).

[30]91 Fla. 260, 267, 107 So. 406, 408 (1926).

[31]101 Fla. 1125, 132 So. 815 (1931).

[32]*Id.* at 1127, 132 So. at 816.

[33]Engleman v. Traeger, 102 Fla. 756, 136 So. 527 (1931).

In 1947 the Court in *Lynch v. Walker*[34] held a company engaged in renting automobiles liable for injuries inflicted through the negligent driving of one of its customers, thus finally embracing without reservation the dangerous instrumentality or so-called entrustment doctrine originally enunciated in the *Anderson* decision. In so doing the Court expressly overruled three previous decisions limiting the doctrine.[35] Taking notice of the confusion as to the basis of liability of a bailor-owner of an automobile for torts committed by his bailee, the Court explained:[36]

> "In some cases the liability is based on the general allegations of principal and agent and in other cases . . . on an implied agency growing out of the relationship of master and servant while in other cases liability is one [*sic*] mere bailment often called 'entrustment'; others speak of liability because of 'license.' . . .
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> ". . .
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> "In all these different relationships there appears a basic and common factor to wit: *When an owner authorizes and permits his automobile to be used by another, he is liable in damages for injuries to third persons caused by the negligent operation so authorized by the owner.*"

The analysis contained in the last quoted paragraph, wherein the Court found a broad conclusion of law as the "basic and common factor" in the relationships existing in the previous cases, is typical of the confusing treatment afforded the question from the beginning. Nevertheless, *Lynch v. Walker* clearly established that in Florida the entrustment doctrine extends to and encompasses the bailment relationship.

FUTURE APPLICATION OF THE DOCTRINE

The firmness of the position of the Court in *Lynch v. Walker* was exceeded only by the breadth of the language used. The rule as reaffirmed in that case contains almost no words of limitation other than the requirement of negligence. The Court has said, however, that

[34]159 Fla. 188, 31 So.2d 268 (1947).

[35]The *White, Eppinger,* and *Warner* decisions; see notes 26, 27 *supra.*

[36]159 Fla. 188, 194, 31 So.2d 268, 271 (1947).

the doctrine of entrustment is not applicable unless the automobile is taken out of the owner's possession by the operator with the former's consent, either express or implied.[37] An owner is likely to limit the extent of his bailment or entrustment by instructions regarding permissible drivers, length of bailment, and area or manner of operation. The question then arises as to whether the Court will impose liability upon the bailor when an accident occurs while the bailee is violating such restrictions. The language of *Lynch v. Walker* is broad enough to permit the Court to hold that the original entrustment is the only element to be considered and that the bailor is liable for any harm caused by the misuse of the dangerous instrumentality he has placed in motion. Under such a theory, violation by the bailee of limitations upon the bailment would be immaterial to the question of the bailor's liability.

The Court could take a contrary view, however, and limit the broad language of *Lynch v. Walker* by holding that the requisite consent must be not only to the taking of the automobile but also to the general activity of the driver which resulted in the accident. Such a viewpoint would ignore the origin and defeat a primary purpose of the dangerous instrumentality doctrine as carried over into the area of vicarious liability. The doctrine was first used in this field to hold a master liable for acts of a servant committed outside the scope of the servant's employment. In its origin, therefore, it was founded upon a concept of vicarious liability for prohibited acts. In Florida the doctrine was extended to include the bailor-bailee relationship, which relationship would not be included within the normal master-servant concepts.[38] To limit liability to authorized acts only would be merely to equate the doctrine to the scope-of-employment restriction of the master-servant situations and to extend the concept of *respondeat superior* to instances of bailment. In effect a "scope of consent" test would be substituted for a "scope of employment" test.

In deciding recent cases the Florida Court has not clearly indicated which of these two theories it prefers. The Court held in *Carter v. Baby Dy-Dee Serv., Inc.*,[39] that the owner was liable to persons injured through the negligent driving of the operator when the

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[37]Lynch v. Walker, 159 Fla. 188, 31 So.2d 268 (1947); Boggs v. Butler, 129 Fla. 324, 176 So. 174 (1937).

[38]See, however, cases concerning the family-purpose doctrine, note 5 *supra*.

[39]159 Fla. 380, 31 So.2d 400 (1947).

borrower was a passenger in the automobile, on the theory that the borrower is presumptively possessed of the auto as bailee. Nothing in the language of the opinion gives any indication as to whether the holding would have been the same if the bailor had expressly forbidden the bailee to let anyone else drive the car.

In *Ford Motor Co. v. Floyd*,[40] a case arising before *Lynch v. Walker* but cited with approval in the latter opinion, the Court indicated by holding the bailor not liable that the violation of a limitation as to permissible drivers would relieve the bailor of liability. The evidence in that case indicated that the servant had bailed the company car to an acquaintance in violation of express company instructions and was not accompanying the bailee when the accident occurred.

A recent decision, *Ragg v. Hurd*,[41] carries a strong implication, however, that the rule of *Lynch v. Walker* may not be so limited by instructions to the bailee. The operative facts were that the driver of the accident car, Harper, had been negotiating with the defendant used car dealers for the purchase of the car. On Sunday the defendants gave Harper permission to try out the car, with instructions to return it that day if dissatisfied, otherwise to return Monday morning to close the sale. Harper retained the car until he negligently struck the plaintiff on the following Thursday, but testified that he informed the defendants at least by Tuesday of that week that he would take the car. The Court, conceiving the principal issue to be the ownership *vel non* of the car, determined that title had not passed to Harper at the time of the accident, and held the defendants liable on the authority of *Lynch v. Walker*.

The holding is of considerable importance to used car dealers and others contemplating the sale of an automobile, particularly in its interpretation of the legislative intent underlying Chapter 319 of Florida Statutes 1951.[42] Its significance for the purposes of the present inquiry, however, lies not in the adjudication of ownership but rather in the failure of the Court to recognize any merit in the defendants' contention that the terms of the bailment had been exceeded. The defendants argued in their brief that if the Court found that the defendants were still the owners at the time of the accident they should

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[40]137 Fla. 301, 188 So. 601 (1939).

[41]60 So.2d 673 (Fla. 1952).

[42]For other cases construing this chapter relating to registration of automobile titles see McQueen v. M. & J. Finance Corp., 59 So.2d 49 (Fla. 1952); Nash Miami Motors, Inc. v. Bandel, 47 So.2d 701 (Fla. 1950).

nevertheless be relieved of liability under the entrustment doctrine because the car was not at that time being operated with the knowledge and consent of the defendants.[43] In other words, the car had been entrusted to Harper for a limited time — a limited bailment — and after the specified period had elapsed the car was no longer being operated with the defendants' consent, express or implied. The effect of this argument on the Court is not revealed by the opinion. One oblique reference is made to this facet of the case in noting that the defendants had filed embezzlement charges against Harper seven days after the accident occurred. It is apparent from the context in which it is found that the Court considered this fact as bearing only on the question of title, feeling that it indicated that the defendants considered themselves the owners even at that late date.

Ragg v. Hurd does not, of course, preclude the possibility that the Court may in the future allow an owner to restrict his possible liability by limiting the entrustment. Analogous authority exists in other jurisdictions, which have in construing statutes similar in effect to the entrustment doctrine allowed the owner to restrict his liability by stipulating that only certain named persons could use the car,[44] and by prescribing a geographical limitation of use.[45]

It is difficult to imagine that the Court would go so far as to impose liability upon the bailor for all the possible misuses which a bailee might make of the car. It is more likely that the Court will reject both of the divergent positions discussed heretofore and adopt a theory which would fall between the two extremes. It might, for example, relieve the bailor of liability only when there had been a violation of reasonable restrictions so gross as to approach a conversion, so that the bailor was no longer the owner and hence no longer liable.[46] A compromise limitation such as this might well lead to an equitable result in a greater number of cases. The *Ford Motor*[47] case supports this possibility but is weak authority both because it was decided before *Lynch v. Walker* and because of the inherent weakness of its reasoning. It is possible to attack the holding on the ground that a bailor should be liable for the negligent acts

[43]Brief for appellants, p. 22, Ragg v. Hurd, 60 So.2d 673 (Fla. 1952).

[44]Fischer v. McBride, 296 Mich. 671, 296 N.W. 834 (1941).

[45]Chaika v. Vandenburg, 252 N.Y. 101, 169 N.E. 103 (1929).

[46]For a case bordering on the proposition posed see Ragg v. Hurd, 60 So.2d 673 (Fla. 1952).

[47]137 Fla. 301, 188 So. 601 (1939).

of a sub-bailee if the act of the bailee in turning the car over to an incompetent or intoxicated sub-bailee is the negligent act which is the cause of the subsequent accident. Furthermore, if an owner is to be held liable in the absence of fault on his part because he has authorized another to operate a dangerous instrumentality, should it matter that the misconduct of the "entrustee" was a negligent sub-bailment rather than negligent driving?

Another question left unanswered by the decisions is whether the bailor will be held liable for acts of the bailee which exceed ordinary negligence. For example, what would be the result should a bailee injure another while driving in a "reckless," "heedless" manner "without regard for human life"? The dangerous instrumentality doctrine as enunciated by the *Anderson* decision and subsequent cases is defined in terms of "ordinary" negligence, and no cases have been found in which more culpable conduct has been indicated. Although it might be argued that the language of the doctrine and the Florida cases would not require its application to a situation involving misconduct greater than ordinary negligence, it is more likely that only that negligence characterized as "willful" would fall without the purview of the doctrine.[48] Certainly this would be in accord with the basic social concepts which underlie the dangerous instrument doctrine and its extension by the Florida Court to alleviate one of the problems created by the automobile.

A collateral question has arisen when the automobile used in the business of the employer belongs to the employee. The question becomes one of whether the Court will extend the dangerous instrumentality concept to such situations. Comparatively recent cases indicate that they will not and that to impose liability upon his employer the employee must be acting within the scope of his employment when he negligently injures another.[49]

CONCLUSION

This note has alluded only briefly to the economic, philosophical,

[48]It has been held in a jurisdiction having a statute very similar to the entrustment doctrine that willful misconduct is not imputable to the owner, Mish v. Brockus, 97 Cal. App.2d 770, 218 P.2d 849 (1950).

[49]Foremost Dairies v. Godwin, 158 Fla. 245, 26 So.2d 773 (1946) (employee-owner of car used in business and maintained by employer involver in accident on way to work); McAllister v. Miami Daily News, 154 Fla. 370, 17 So.2d 613 (1944). *But cf.* Western Union Tel. Co. v. Michel, 120 Fla. 511, 163 So. 86 (1935).

and sociological arguments that underlie the allocation of liability in automobile accident cases. Whether liability should be founded on the older concept of "fault" or the comparatively modern "deep pocket" theory is a controversial question too involved to be fully dealt with here.[50] Any complete consideration of the problem requires an understanding of the impact of insurance and its utility for spreading the loss throughout the community. It is clear, however, that the *Anderson* decision and its subsequent interpretations culminating with *Lynch v. Walker,* insure that a financially responsible defendant will be available in a greater number of cases. The Court, while disdaining to fall back on the liability restricting rules of *respondeat superior* and bailment, has been hesitant to adopt a rule of absolute liability. It has left the door open to limiting the dangerous instrumentality concept. The result has been and still is an uncertain area of liability.

The future development is a matter of speculation. The Court may extend the doctrine and hold the owner liable for even the willful misconduct of a bailee who has converted the car of the owner. By so doing another and possibly financially responsible defendant would be furnished regardless of the other equities of a particular cause. It seems much more likely, however, that the Court will at some point limit the entrustment doctrine.

A. EUGENE CARPENTER, JR.

[50]See James, *Accident Liability: Some Wartime Developments,* 55 YALE L.J. 365 (1946).